APPENDIX.

Section 11409. Missouri Sales Tax Act, Laws of 1941, pages 702 and 703.

Exemptions.—There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this article, no tax shall be paid or collected under this article upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into foodstuffs which are to be sold ultimately in processed form at retail.

Opinion of Attorney-General.

February 8, 1941.

Mr. Thomas N. Dysart, President
St. Louis Chamber of Commerce

Mr. George A. Catts
Executive Manager
Kansas City Chamber of Commerce

Gentlemen:

Your inquiry of January 2, 1941, is acknowledged, wherein you state:

"The Kansas City and St. Louis Chambers of Commerce have had hundreds of calls from members relative to the rule of the State Auditor, administering official of the two per cent Missouri Sales Tax, broadening the taxable base of interstate transactions under that law. The rule, which the State Auditor says is based upon a decision of the Supreme Court of the United States in the case of McGoldrick against the Berwind-White Coal Mining Company, in substance levies a use tax upon Missouri business complementary to the sales tax.

"In view of the fact that the Missouri Legislature in 1939 considered and refused to pass a use tax law, in addition to considering and passing a sales tax act, the rule of the State Auditor applying a use tax by regulation creates a question which can be settled only by the Attorney-General.

"The members of both the Kansas City and the St. Louis Chambers have asked whether a regulation of the State Auditor is sufficient to enforce collection of a use tax which had been rejected by the law-making body of the state.

"Because of this situation, the two Chambers of Commerce jointly are desirous of ascertaining whether or not

you, as Attorney-General, have ruled on the question. If you have, is a copy of your opinion on the subject available? If you have not ruled on the question, and it is proper to do so, the two Chambers will appreciate it if you can indicate in an opinion whether the State Auditor is within his authority in enforcing a use tax which has been rejected by the Legislature. An opinion by you will be of vital concern to thousands of taxpayers throughout Missouri.

"The Kansas City and St. Louis Chambers of Commerce make this inquiry and request jointly."

While Section 11274, R. S. Mo. 1929, requires this office to give written opinions to certain public officials only, but due to the wide-spread effect and public interest in the ruling referred to in your letter, this Department feels it proper to comply with your request.

Effective as of October 1st, 1940, Honorable Forrest Smith, State Auditor, promulgated the following "Rule and Regulation":

"1. Goods Coming Into This State.

"When tangible personal property is purchased for use or consumption in this state and (1) the seller is engaged in the business of selling such tangible personal property in this state for use or consumption and (2) delivery is made in this state, such sale is subject to the sales tax. Such sale is taxable regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured by the seller at a specified point outside this state and shipped directly to the purchaser from the point of origin.

"If the conditions above are met it is immaterial (1) that the contract of sale is closed by acceptance outside the state or (2) that the contract is made before the property is brought into the state.

"Delivery is held to have taken place in this state (1) when physical possession of the tangible personal property is actually transferred to the buyer within this state or (2) when the tangible personal property is placed in the mails at a point outside this state directed to the buyer in this state or placed on board a carrier at a point outside this state (FOB or otherwise) and directed to the buyer in this state.

"Engaging in business in this state shall include any of the following methods of transacting business: maintaining directly, indirectly or through a subsidiary an office, distribution house, sales house, warehouse or other place of business or having an agent, salesman or solicitor operating within the state under the authority of the seller or its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state."

The Missouri Sales Tax Act has, since its inception in 1934 (Laws of 1933, Extra Session, page 156) and does now levy and impose a tax "(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged," and provides (Laws of 1939, page 861) as follows:

"The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. * * *."

A "Sale at retail" is defined as:

" 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. * * *"

Section 7 of the Act (Laws of 1939, page 861) provides:

"For the purpose of more efficiently securing the payment of and accounting for the tax imposed by this Act, the State Auditor shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this Act, and may employ such employees and attorneys as may be necessary to carry out the provisions of this Act, and shall fix their duties, title, expenses and compensation within the limits of the appropriation acts. * * *"

When the Act was amended in 1937 the exemptions (Laws of 1937, page 558) from the tax included "retail sales may be made between this state and any other state of the United States * * *."

Section 3 of the present statute (Laws of 1939, page 860) in part provides:

"There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. * * *"

The above "Regulations" have never been passed upon by a court of last resort in this state. They present a question that cannot be answered by the decisions of other forums, due to the difference in the various statutes and ordinances levying the tax. An examination of the statutes of twenty-eight states and several city ordinances, including an ordinance of New York City, discloses only

one state other than Missouri that has exempted from the tax "transactions between this state and any other state." The above words are used in a statute of West Virginia, and, while the exemption clause of that statute has evidently never been passed upon, the statute was considered by the Supreme Court of the United States, as will be presently noted.

The usual exemption provision found in sales tax laws saves from taxation "retail sales which the state is prohibited from taxing under its Constitution and the Constitution and laws of the United States." It is apparent that such an exemption is much more restricted than the Missouri exemption.

In addition to a sales tax law at least eighteen states have enacted so-called "use tax" laws whereby the use, storage and consumption of tangible personal property was taxed. This tax was, no doubt, designed to supplement sales tax incomes by exacting a tax from tangible personal property sold in interstate commerce, after the goods have come to rest within the taxing state.

The "Regulation" above set out is an apparent attempt to impose a "use" or "consumption" tax and its effectiveness of necessity must be gaged by the Missouri Sales Tax Law and its proper construction.

The construction of a statute involves, among other things, the intention of the Legislature in passing the Act.

"* * * 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' * * *"

(Artophone Corporation v. Coale, 133 S. W. (2d) 343, l. c. 347.)

In this connection it is well to bear in mind that the Sixtieth General Assembly amended the Sales Tax Act in 1939, but refused to pass Committee Substitute for House Bill No. 2, which sought to impose an excise tax "upon the storage, use, or other consumption in this state of tangible personal property."

It is a well settled rule in this state that "the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and all such laws are to be construed strictly against such taxing authority" (State ex rel. Ford Motor Co. v. Gehner, 27 S. W. (2d) 1, 3, (Mo. Sup.).) and that "generally it may be said that taxing statutes are to be strictly construed in favor of the taxpayer and the fact that a particular subject of taxation, claimed to be taxed, is within the purview and intendment of the taxing statute must clearly appear from the statute so to be." (Artophone Corporation v. Coale, 133 S. W. (2d) 343, 347 (Mo. Sup.).)

The Missouri Sales Tax is an excise tax (State ex rel. Missouri Portland Cement Co. v. Smith, 90 S. W. (2d) 405) upon "every retail sale in this state" and is not a so-called "use" tax.

In passing upon a sales tax statute similar to ours, when an attempt had been made to collect a tax on certain articles purchased by a resident in a foreign state and brought into the State of Arkansas, the Supreme Court of Arkansas in the case of Mann v. McCarroll, 130 S. W. (2d) 721, held such property not subject to the tax and said, l. c. 726:

"* * * But it is a fact, not now open to controversy, that if the Legislature did intend to levy and provide machinery for the collection of a use tax, that fact was so hidden and concealed as not to be readily discoverable. As we have heretofore stated, it is conceded that if this provision of the act must be treated as a sales tax on sales made in other states, it is illegal and unenforcible.

It is on that account that the commmissioner of revenues now argues that it is a use tax, although the language used in this provision refers only to a sales tax.

"It may be said in passing that a sales tax and a use tax are by no means identical. The rule is that in a sales tax the property sold changes hands. There is a change of ownership. The new owner who purchases pays the sales tax to the seller who becomes the agent for the state for its collection.

"The buyer pays the tax as an incident to the price. In a use tax there is no change of possession, no change of ownership, but the owner pays this tax which is an excise or exaction charged because of the owner's privilege to exercise or assert some of the elements of ownership over the property. In the use tax the seller does not collect the tax as an agent for the state, but the buyer, according to the contention made here, must account for the property which he actually owns and pay a tax allegedly of the same percentage as a sales tax. * * *"

The distinction was made in New York between a sales tax and a use tax in the case of Williamsburg Power Plant Corporation, 7 N. Y. S. (2d) 326, 330, holding as follows:

"A tax on personal property situated or owned within New York City at rate of 2 per cent of value of property as determined by actual price paid for property was an 'indirect tax,' and to that extent an 'excise tax,' and was a tax upon the consumption of or the opportunity to 'use' property and was not a tax on the 'transaction' of purchase * * *."

As the Missouri sales tax is an excise tax the constitutional provision against exempting property from taxation does not apply and the Legislature may exempt any sale from the tax that it cares to exempt. State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093; Ludlow-Saylor

Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S. W. 196; Bacon v. Ranson, 331 Mo. 985, 56 S. W. (2d) 786; State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453; and State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, 90 S. W. (2d) 405, l. c. 407.

The Missouri law requires the transaction to be a complete transaction within its confines before the transaction is taxable, as the tax imposed is one "upon every retail sale in this State of tangible personal property" and exempts "sales * * * made between this state and any other state of the United States."

The Supreme Court of the United States in passing upon a West Virginia statute in the case of James v. United Artists Corporation, 305 U. S. 410, 59 Supreme Court Rep. 272, that imposed a tax "upon every person engaging * * * within this state in the business of collecting incomes from the use of real or personal property * * *" held:

"* * * We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it, or whether the solicitation of the contracts may be taxed. No such taxation is attempted by Sec. 2-(i). The taxing provisions of Sec. 2 are restricted in their application to various enumerated classes of activities within the state, one of which, specified in Sec. 2-(i), is that of engaging there in the business of collecting incomes. The conduct of such a business or activity by appellee requires its presence there, or that of its agent, and the collection of income within the state by the one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in solicitation of the contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the

state, we can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise.

* * * * * * *

"* * * The emphasis placed by Sec. 2 and its various subsections on the carrying on of business or other specified activities within the state as the condition of laying the tax, and the fact that the exhibitors' receipts are taxed in their hands under Sec. 2-(g), lead to the conclusion that there was no legislative purpose in cases like the present to tax gross receipts apart from the business or activity of collecting them, carried on within the state. * * *"

In the above case it was sought to tax the corporation whose agent solicited for orders within the state, which orders were accepted by the office of defendant in another state and collections were remitted to that office.

*The words of exemption: "such retail sales as may be made between this state and any other state of the United States" means "sales between citizens of this state and citizens of any other state of the United States"— in short, interstate sales. This wording is comparable to the wording of Clause 3 of Section 8 of Article 1 of the United States Constitution. It has been uniformly ruled that the latter provision means: "commerce with the citizens of foreign nations, among the citizens of the several states * * *"—interstate commerce. An attempt to limit the above exemption clause of the Missouri statute to "sales made between the State of Missouri and any other state" would be absurd. It is common knowledge that one state rarely sells property to another state, while citizens of one state continuously trade with citizens of other states.*

The "regulations" attempt to tax property transported from another state or nation to a resident of Missouri

upon an order accepted in the foreign state or nation, although solicited in Missouri, and is ineffective as such transactions are "sales * * * between this state and any other state" and do not constitute a "retail sale in this state." State ex rel. Telegraph Co. v. Markay, 110 S. W. (2d) 1118, 341 Mo. 980; State ex rel. Parish v. Young, 327 Mo. 909, l. c. 915, 38 S. W. (2d) 1021; State v. Best & Co., 194 La. 918, 195 So. 356; Artophone Corporation v. Coale, 133 S. W. (2d) 343; Waseca v. Brauer, 288 N. W. 229 (Minn.); James v. United Artists Corp., 305 U. S. 410, 59 Sup. Ct. Rep. 272 and Mann v. McCarroll, 130 S. W. (2d) 721.

Due to the particular wording of the Missouri Sales Tax Act we are not concerned with the right or power of Missouri to tax interstate commerce, or the storage, use or consumption of personal property in Missouri. The right to tax interstate commerce is one question and whether the Legislature in fact laid a tax upon interstate transactions is another and distinct question.

This distinction has been pointed out by the Supreme Court of Missouri. In the case of Artophone Corporation v. Coale, 133 S. W. (2d), l. c. 347, in passing upon a provision of the income tax law, it was held:

"We need not here discuss or consider the question whether or not the Legislature could tax the entire net income from all sources of a domestic corporation. The question is, does the present law do so?"

Again, in State v. Shell Pipe Line Co., 139 S. W. (2d) 510, l. c. 519, it is said:

"It is of slight consequence that the state may have the power to levy a franchise tax on a foreign corporation authorized to transact business in Missouri, but which may not be doing so, unless the state has exercised that power by appropriate legislation."

The "regulation" is evidently based upon the holding of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33, 84 L. Ed. 565. In that case the court considered and held good an ordinance of the City of New York imposing a tax "upon purchasers for the consumption of tangible personal property" in the City of New York. While the decision is far-reaching the ordinance involved is so different from the Sales Tax Act of Missouri that it affords little support to the "regulations" here involved. The decision turns upon the right of a state or city to tax tangible personal property brought into such state or city from another state upon a contract entered into with a resident agent of the seller in the taxing state or city, which contract provides for the delivery of the property in the territory of the taxing power. The ordinance does not exempt interstate commerce and the tax was imposed by legislation (a city ordinance) and not by rule or regulation of an administrative officer.

While Missouri's sales statutes provide that the State Auditor may make rules and regulations for the enforcement of the act, such provisions do not authorize the Auditor to collect a tax not specifically laid by the Legislature, as the Legislature only may impose a state tax. Article X, Section 1, Constitution of Missouri; State ex rel. Parish v. Young, 38 S. W. (2d) 1021, 327 Mo. 909, l. c. 915.

The right to levy a tax may not be delegated by the Legislature to an administrative officer. Merchants Exchange v. Knott, 212 Mo. 616; State ex rel. Field v. Smith, 329 Mo. 1019, l. c. 1027; Little River Drainage District v. Lassater, 325 Mo., l. c. 502-3.

CONCLUSION.

It is the conclusion of this Department that the above-quoted "regulation" in so far as it attempts to tax the sale of tangible personal property outside the State of Missouri and delivered in Missouri to the purchaser, even though purchased upon an order given to an agent of the seller in Missouri, but where the order is finally accepted in a foreign state, and also sales of tangible personal property in Missouri, to a citizen of another state and where such property is not purchased for consumption in Missouri but for the purpose of being transported to the other state, is invalid.

Respectfully submitted,

(Signed) Vane C. Thurlo,
Assistant Attorney-General.

Approved:

(Signed) Roy McKittrick,
Attorney-General.

VCT:CP